No. 76-25

In the Supreme Court of the United States

OCTOBER TERM, 1976

WILLIAM E. DOULIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on May 14, 1976. On June 4, 1976, Mr. Justice Marshall extended the time in which to file a petition for a writ of certiorari to and including July 13, 1976, and the petition was filed on July 12, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner's false declarations before two grand juries were material to the proper inquiry of the grand juries.

2. Whether the district court violated petitioner's Sixth Amendment right to trial by jury by ruling that his false declarations before two grand juries were material as a matter of law.

STATEMENT

After a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted on four counts of making false declarations before a grand jury, in violation of 18 U.S.C. 1623. He was sentenced to a concurrent term of two and one-half years' imprisonment on each count, all but six months of which was suspended in favor of two years' probation. The court of appeals affirmed (Pet. App. A).

The evidence at trial and at a mid-trial materiality hearing showed that in June 1973 petitioner, who was then Chairman of the Republican Committee in Orange County, New York, appeared before a federal grand jury in the Southern District of New York that was investigating alleged payments to Orange County officials to obstruct the enforcement of local gambling laws. Petitioner denied participating in any such activity and also denied having received money to secure a probationary sentence for one Richard Monell, who had been convicted of assault in the New York State courts. In February 1975 petitioner was called before a second grand jury in the Southern District of New York, which was investigating official corruption and possible perjury committed before the first grand jury. Again petitioner denied any improper conduct with respect to the local gambling operations or the Monell prosecution (Pet. App. A-3 to A-4).

Contrary to these assertions, however, the proof showed that Jean Grant, Monell's grandmother and petitioner's life-long friend, had asked petitioner to use his influence to obtain a sentence of probation for Monell. Petitioner

agreed and contacted Abraham Weissman, the Assistant District Attorney handling the Monell case, indicating to Weissman that his aspirations for higher office might well be fulfilled if he recommended that Monell not be given a jail sentence. Weissman made the requested recommendation and the desired sentence was imposed. Shortly after the sentencing, Mrs. Grant withdrew $1,400 from her savings account and delivered it to petitioner in payment for his assistance in Monell's case (Pet. App. A-3 to A-5).

ARGUMENT

1. Petitioner does not deny the falsity of his statements before the two grand juries. Nor does he contest the grand jury's authority to investigate an alleged conspiracy to interfere with the enforcement of local gambling laws. See 18 U.S.C. 1511. Rather, petitioner contends (Pet. 7-8) that the government failed to prove that his false statements concerning his involvement in the Monell matter were material to an investigation properly within the jurisdiction of the grand juries.

The test of materiality is whether a false statement had a natural effect or tendency to influence, impede, or dissuade the grand jury from pursuing its investigations. *United States* v. *Paolicelli*, 505 F. 2d 971, 973 (C.A. 4); *United States* v. *Devitt*, 499 F. 2d 135, 139 (C.A. 7), certiorari denied, 421 U.S. 975; *United States* v. *Lardieri*, 497 F. 2d 317, 319 (C.A. 3); *United States* v. *Mancuso*, 485 F. 2d 275, 280 (C.A. 2); *United States* v. *Koonce*, 485 F. 2d 374, 380 (C.A. 8); *United States* v. *Makris*, 483 F. 2d 1082, 1088 (C.A. 5), certiorari denied, 415 U.S. 914; *United States* v. *Lococo*, 450 F. 2d 1196, 1199 (C.A. 9), certiorari denied, 406 U.S. 945. For a statement to be material under the perjury statute, it need not be dispositive of the inquiry. *United States* v. *Birrell*, 470 F. 2d 113, 115, n. 1 (C.A. 2). All that must be shown is that "a truthful answer would

have been of sufficient probative importance to the inquiry so that, as a minimum, further fruitful investigation would have occurred." *United States* v. *Freedman*, 445 F. 2d 1220, 1227 (C.A. 2). See also *United States* v. *Paolicelli*, *supra*, 505 F. 2d at 973; *United States* v. *Devitt*, *supra*, 499 F. 2d at 139.

The district court correctly concluded that petitioner's false statements were material to the grand jury's inquiry. Petitioner's acceptance of a bribe to use his political influence to affect the outcome of the Monell prosecution demonstrated that he had the means as well as the inclination to interfere in other local criminal matters as well. A truthful response would have led to further questioning about the source and ultimate disposition of the bribe, and might have corroborated other testimony before the grand jury that petitioner was protecting illegal gambling operations in Orange County. Moreover, petitioner's ability to corrupt at least one member of the Orange County District Attorney's office raised the prospect that others might also have purchased illegal favors from the same official. Thus, petitioner's truthful answers about the Monell matter might have provided substantial assistance to the grand jury's inquiry concerning official corruption, and, accordingly, his false statements were material to that investigation.[1]

2. Petitioner contends (Pet. 9-11) that the district court's finding of materiality as a matter of law violated his Sixth Amendment right to a trial by jury on each element of

[1]Petitioner's claim (Pet. 7-8) that his testimony was necessarily inmaterial because the grand jury had no jurisdiction to look into the Monell case is incorrect since, as the court of appeals noted (Pet. App. A-8), "[t]he grand jury's duty and indeed responsibility to inquire is not coterminous with its power to indict." See *United States* v. *Mancuso*, *supra*, 485 F. 2d at 283; *United States* v. *Cohn*, 452 F. 2d 881 (C.A. 2), certiorari denied, 405 U.S. 975.

the offense. Although petitioner concedes that the court's authority to determine the issue of materiality of false statements in a perjury case was upheld in *Sinclair* v. *United States*, 279 U.S. 263, 297-298, he nevertheless suggests that the Court should "re-examine this archaic rule which is out of joint with contemporary thought" (Pet. 11).

In *Sinclair*, this Court recognized that the materiality of a witness's statements to an investigation does not depend upon the probative value of the statements, but is similar to the determination of relevancy made by a trial court prior to the admission of evidence. Since materiality is a question of law, it is properly resolved by the court rather than the jury. This rule has been applied without exception by the lower courts. See, *e.g.*, *United States* v. *Saenz*, 511 F. 2d 766, 768 (C.A. 5), certiorari denied, 423 U.S. 946; *United States* v. *Romanow*, 509 F. 2d 26, 28 (C.A. 1); *United States* v. *Demopoulos*, 506 F. 2d 1171, 1176 (C.A. 7), certiorari denied, 420 U.S. 991; *United States* v. *Paolicelli*, *supra*, 505 F. 2d at 973; *Tasby* v. *United States*, 504 F. 2d 332, 337 (C.A. 8), certiorari denied, 419 U.S. 1125; *United States* v. *Masters*, 484 F. 2d 1251, 1254 (C.A. 10); *United States* v. *Stone*, 429 F. 2d 138, 140 (C.A. 2); *Vitello* v. *United States*, 425 F. 2d 416, 423 (C.A. 9), certiorari denied, 400 U.S. 822.[2] In these circumstances, there is no reason for the Court to reconsider this well-established doctrine.

[2]The rule is not unique. An essential element of the crime of perjury under 18 U.S.C. 1621, for example, is that the false statement be made to a "competent tribunal." *United States* v. *Debrow*, 346 U.S. 374. Whether a particular tribunal is competent is a question of law, to be decided by the court. See *Caha* v. *United States*, 152 U.S. 211; *Young* v. *United States*, 212 F. 2d 236 (C.A. D.C.), certiorari denied, 347 U.S. 1015.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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